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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

American Communications Services, Inc.)

Petition for Expedited Declaratory)
Ruling Preempting Arkansas Public)
Service Commission Pursuant to Section)
252(e)(5) of the Communications Act)
of 1934, as amended)

CC Docket No. 97-100

REPLY COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

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May 20, 1997

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SUMMARY

ACSI's Petition for Declaratory Ruling requests that the Commission preempt the Arkansas Public Service Commission ("Arkansas PSC") from arbitrating and approving interconnection agreements, and from refusing requests by competitive local exchange carriers ("CLECs") for designation as carriers qualified to receive universal service support except as provided by the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"), and the Commission's *Local Competition Order*. In these Reply Comments, ACSI submits again that any state legislation, such as the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"), that absolutely prevents a state commission from considering the full range of interconnection options and from imposing additional requirements is fundamentally inconsistent with, and subversive to, the federal statutory and regulatory scheme. Such legislation harms ACSI directly and prevents it from competing with incumbent local exchange carriers ("ILECs") on a level playing field. The Arkansas PSC has been stripped of its authority to participate in the development of local competition in partnership with the Federal Communications Commission and, therefore, has been constructively abolished.

The Arkansas Act denies ACSI and other competitors the ability to obtain directives from the Arkansas PSC that mandate Southwestern Bell or other ILECs to fulfill bona fide requests for facilities needed to provide competitive services. While the Arkansas Act does not set up a conventional "barrier to entry," it does set up barriers to developing viable competitive businesses by limiting access to the full range of network elements. Moreover, the Arkansas Act severely limits CLEC access to state and federal universal service funding, making it economically impossible for CLECs to compete in certain high cost areas of the state. By limiting access to unbundled network elements and universal service funding, the

Arkansas Act has the effect of thwarting the competitive provision of certain critical telecommunications services. This subverts the Commission's goal of removing regulatory, economic and operational impediments to competition and promoting viable competition nationwide.

ACSI asks that the Commission recognize and stop a situation that will erupt across the country if not checked. The 1996 Act and the Commission's *Local Competition Order* form a partnership with the states. It is becoming increasingly apparent, however, that SBC Communications, Inc. is adept at persuading state legislatures to pass laws that tie the hands of state commissions and prevent them from functioning as equal partners with the FCC. State commissions that are unable to fulfill their responsibilities under the 1996 Act, whether due to ILEC-sponsored legislation or otherwise, should be preempted.

Moreover, with the recent adoption of formal universal service rules by the Commission, preemption of the universal service provisions of the Arkansas Act, which severely limit the ability of a CLEC such as ACSI to qualify as an eligible telecommunications carrier ("ETC") for purposes of receiving universal service at both the state and federal levels, is not premature. Section 5 of the Arkansas Act defines ILECs as ETCs for purposes of receiving Arkansas Universal Service Fund ("AUSF") and federal universal service funding. The requirements on ETC designation established by the Arkansas Act exceed the federal requirements and must be preempted.

Therefore, ACSI respectfully urges the Commission to preempt the Arkansas PSC from arbitrating and approving interconnection agreements, and from refusing requests by CLECs for designation as ETCs pursuant to Sections 252(e)(5) and 253 of the 1996 Act.

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To: The Commission

REPLY COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

American Communications Services, Inc. ("ACSI"), by its attorneys, hereby respectfully submits these reply comments pursuant to the rules and regulations of the Federal Communications Commission ("Commission" or "FCC").

INTRODUCTION

On March 25, 1997, ACSI filed a Petition for Declaratory Ruling requesting that the Commission preempt the Arkansas Public Service Commission ("Arkansas PSC") from arbitrating and approving interconnection agreements, and from refusing requests by competitive local exchange carriers ("CLECs") for designation as carriers qualified to receive universal service support except as provided by the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 (the "1996

Act"), and the Commission's *Local Competition Order*.^{1/} On May 5, 1997, the Arkansas Attorney General and Arkansas incumbent local exchange carriers ("ILECs") filed comments in opposition to ACSI's Petition, arguing that the Arkansas Telecommunications Regulatory Reform Act of 1997 (the "Arkansas Act") satisfies the requirements of the 1996 Act even though it prevents the Arkansas PSC from going beyond the minimum national standards set forth by Congress and the Commission and imposes additional requirements on CLECs seeking designation as "eligible telecommunications carriers" ("ETCs") for purposes of receiving universal service funding.^{2/} The Arkansas PSC did not file comments, but AT&T submitted a staff analysis of the Arkansas Act which supports ACSI's Petition for Declaratory Ruling in many regards.

ACSI strongly disagrees with these opposing commenters and submits again that any state legislation, such as the Arkansas Act, that absolutely prevents a state commission from considering the full range of interconnection options and from imposing additional requirements is fundamentally inconsistent with, and subversive to, the federal statutory and regulatory scheme. Such legislation harms ACSI directly and prevents it from competing with ILECs, including Southwestern Bell Telephone Company ("Southwestern Bell"), on a level playing field.

As a CLEC, ACSI relies heavily on state commissions, such as the Arkansas PSC, to arbitrate and approve interconnection agreements that will permit ACSI to develop a viable competitive business. If the Arkansas PSC is denied all discretion by a state statute designed

^{1/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (1996) ("*Local Competition Order*").

^{2/} *See, e.g.*, Comments of the Northern Arkansas Telephone Company, p. 5; Comments of Southwestern Bell Telephone Company, pp. 7-13, 17-18; Comments of Arkansas Attorney General, pp. 15-16; Comments of the Arkansas Telephone Association, pp. 8-14, 16-20.

to favor ILECs in Arkansas, ACSI and other CLECs will not be able to compete against Southwestern Bell and other incumbents. This is not what Congress intended.

Moreover, with the recent adoption of formal universal service rules by the Commission,^{3/} preemption of the universal service provisions of the Arkansas Act, which severely limit the ability of a CLEC such as ACSI to qualify as an ETC for purposes of receiving universal service at both the state and federal levels, is not premature. Therefore, ACSI respectfully urges the Commission to preempt the Arkansas PSC from arbitrating and approving interconnection agreements, and from refusing requests by CLECs for designation as ETCs pursuant to Sections 252(e)(5) and 253 of the 1996 Act.^{4/}

The FCC's ruling in this case will have importance beyond the state of Arkansas. It will signal to SBC Communications, Inc. ("SBC") that it cannot neuter the competent and vigorous regulators in the states in which it operates, and prevent full implementation of the 1996 Act by sponsoring the kind of anti-competitive legislation that it has obtained in Texas and Arkansas, and will likely obtain shortly in Oklahoma. The will of Congress, the FCC and the state commissions should not be nullified by SBC's influence with state legislators.

^{3/} *Federal-State Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997).

^{4/} 47 U.S.C. §§ 252(e)(5), 253.

I. ACSI HAS STANDING TO REQUEST PREEMPTION OF THE ARKANSAS PSC

The Arkansas Attorney General states that ACSI "does not have standing, nor are its claims ripe" because ACSI has not shown that it has suffered an "injury in fact" which is traceable to the Arkansas Act and is redressable by the relief it requests.^{5/} However, as the Commission has observed, "there are *no* statutory or regulatory standing requirements applicable to the Commission in the declaratory ruling context" even though the Commission considers standing a "useful factor" in determining whether there is a controversy or uncertainty warranting Commission action.^{6/} Thus, whether ACSI has shown that it has suffered an "injury in fact" that is traceable to the Arkansas Act is not dispositive of whether the Commission can grant the relief requested.

Nonetheless, ACSI is, in fact, directly and identifiably harmed by the Arkansas Act. As a competitive provider of local exchange services in Arkansas, ACSI must be able to seek arbitration and approval of its interconnection agreements with Southwestern Bell and other ILECs in Arkansas. The existence of an interconnection agreement between ACSI and Southwestern Bell signifies only that Southwestern Bell has agreed to provide certain network elements to ACSI at a set price for a set period. The existing ACSI/Southwestern Bell Interconnection Agreement does not constitute the outer limits of every possible arrangement ACSI and Southwestern Bell could make and ACSI retains the right to seek additional network elements from Southwestern Bell as necessary to accommodate its business needs, even if those arrangements go beyond the minimum requirements for interconnection

^{5/} Comments of Arkansas Attorney General, p. 8. *See also* Comments of Arkansas Telephone Association, pp. 5-6.

^{6/} *Omnipoint Communications, Inc.*, 11 FCC Rcd 10785, ¶ 7 (1996) (emphasis added).

established by the 1996 Act and the Commission's *Local Competition Order*. Therefore, whether the Arkansas PSC has the authority to approve and order such additional elements is of direct and immediate consequence to ACSI and its ability to negotiate for and obtain unbundled network elements beyond those provided for in the *Local Competition Order*.

As a result, ACSI has an immediate and substantial interest in whether the Arkansas PSC has the authority it needs to give full consideration to ACSI's requests for unbundled network elements when arbitrating and approving interconnection agreements. ACSI submits that the Arkansas PSC's "full consideration" requires it to have the authority to consider and approve requests that go beyond the 1996 Act and the *Local Competition Order*. Since the Arkansas Act unequivocally prohibits the Arkansas PSC from giving full consideration to any request for new unbundled elements, ACSI has standing to seek preemption as set forth in its Petition for Declaratory Ruling.

As for "ripeness," the Arkansas Attorney General would require a CLEC in Arkansas seeking unbundled network elements not previously designated by the Commission to pursue its request, and Southwestern Bell's refusal, through a charade at the Arkansas PSC *even though the Arkansas PSC is statutorily barred from overruling Southwestern Bell*. In such a case, the Arkansas Act preordains the outcome -- denial of all such requests -- and generates a futile proceeding before the Arkansas PSC that causes only delay and further costly litigation.

The Supreme Court has stated that "[o]ne does not have to await the consummation of a threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."^{2/} In addition, federal courts have determined that, in the context of declaratory

^{2/} *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

rulings, "[w]here the issue presented is predominantly legal, a factual record is not as important as in fact-sensitive inquiries."^{8/} According to the Supreme Court, "the question of preemption is predominantly legal."^{9/} Thus, the Commission is not required to wait for harm and delay actually to occur before taking action in this case.

Some commenters suggest that principles of federalism require the Commission to deny ACSI's Petition for Declaratory Ruling.^{10/} In fact, neither principles of federalism nor the Tenth Amendment to the Constitution of the United States prevent the Commission from preempting the Arkansas PSC as requested by ACSI.

The 1996 Act specifically recognizes the appropriateness of federal preemption where states cannot, or will not, fulfill the role assigned to them by Congress to promote local competition.^{11/} Moreover, Congress has recognized that preemption is appropriate where states adopt legislative or regulatory measures that are inconsistent with federal law.^{12/} Thus, the level of discretion accorded to states in regulating local telecommunications services has been modified substantially, blurring the once clear jurisdictional boundaries between intrastate and interstate telecommunications upon which these commenters rely.

In addition, the Staff of the Arkansas PSC specifically has observed that several provisions of the Arkansas Act, including those cited by ACSI, are subject to preemption

^{8/} *PIC-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1300 (3d. Cir.), *cert. denied* 116 S. Ct. 2504 (1996).

^{9/} *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

^{10/} Comments of the Northern Arkansas Telephone Association, pp. 10-12; Comments of the Arkansas Attorney General, pp. 18-20.

^{11/} See 47 U.S.C. §§ 252(e)(5), 253.

^{12/} See 47 U.S.C. § 254(f).

because they conflict with the 1996 Act.^{13/} Thus, principles of federalism do not affect the Commission's authority to preempt the Arkansas PSC as requested by ACSI.

II. THE ARKANSAS ACT CONSTRUCTIVELY ABOLISHES THE ARKANSAS PSC

As ACSI noted in its Petition for Declaratory Ruling, both the Communications Act and the *Local Competition Order* contemplate a significant role for the states in *fostering* local competition under Sections 251 and 252.^{14/} In the *Local Competition Order*, the Commission asserted that the 1996 Act "forges a new partnership between state and federal regulators" and that, in this new partnership, the "states will play a critical role in promoting local competition" by performing a key function in the negotiation and arbitration process.^{15/}

In its comments, the Arkansas Telephone Association ("ATA") observes that the wording of the Arkansas Act "provides a limitation only upon such services beyond those required by the Federal Act."^{16/} The ATA also observes that the Arkansas Act prohibits the Arkansas PSC from requiring an ILEC's statement of generally available terms and

^{13/} See Comments of AT&T, Exhibit A (Analysis of the Arkansas Telecommunications Regulatory Reform Act of 1997, prepared by the Staff of the Arkansas PSC, pp. 1, 6, 8, 11, 13 (the "Arkansas PSC Staff Analysis")).

^{14/} ACSI Petition, p. 7.

^{15/} *Id.* at ¶ 133. As the Commission observed, "*the actions taken by a state will significantly affect the development of local competition in that state.* Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework." *Id.* at ¶ 137 (emphasis added). ACSI notes that the obligation to "promote" competition is distinctly different from passively allowing competition to develop or from permitting competition to exist despite taking affirmative steps to make it infeasible.

^{16/} Comments of the Arkansas Telephone Association, p. 10.

conditions to "exceed the minimum requirements of the [1996 Act]."^{17/} ACSI submits that, under these conditions, the Arkansas PSC is constructively abolished because it cannot be a full partner with the FCC in promoting local competition and can do no more than repeat what the FCC has already proclaimed. Therefore, the Arkansas PSC should be preempted and replaced by the body which makes the only lawful rules under the Arkansas Act -- the FCC.

Moreover, the ATA states that ACSI has not established that the Arkansas PSC, due to the passage of the Arkansas Act, cannot provide all relief authorized under the 1996 Act.^{18/} Yet, again, by definition, the Arkansas PSC cannot provide all relief authorized under the 1996 Act and the *Local Competition Order* because both explicitly contemplate that the federal requirements will set the *minimum* and that the states commissions will have the flexibility to identify and impose additional requirements.^{19/} The Arkansas PSC no longer has this flexibility, and therefore, cannot fulfill its statutory obligations under the 1996 Act.

Other commenters claim that preemption is not warranted under Section 252(e)(5) because the Arkansas PSC has not yet "failed to act" to carry out its responsibility under Section 252.^{20/} What they refuse to acknowledge, however, is that the Arkansas Act has

^{17/} *Id.*

^{18/} Comments of the Arkansas Telephone Association, pp. 5-6.

^{19/} The Commission stated that "[u]nder the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services *beyond the rules the Commission establishes in [the Local Competition Order]*." *Local Competition Order*, ¶ 135 (emphasis added).

^{20/} See Comments of Arkansas Attorney General, p. 14-15; Comments of Southwestern Bell, pp. 14-16.

made it functionally impossible for the Arkansas PSC to act at all in the manner, and with the degree of flexibility, contemplated by Congress and the Commission.

As ACSI noted in its Petition for Declaratory Ruling, in order to fulfill their responsibilities under the Communications Act, state commissions must be able to arbitrate and approve interconnection agreements.^{21/} The Communications Act provides that state commissions must meet certain standards when arbitrating an interconnection agreement, including: (1) ensuring that the arbitrated agreement meets the requirements of section 251 and the *Local Competition Order*; (2) establishing any rates for interconnection, services, or network elements pursuant to the terms of section 252(d); and (3) providing a schedule for implementation of the terms and conditions by the parties to the agreement.^{22/} The Communications Act does not limit the authority of the state commissions in arbitrating interconnection agreements in any other way. By denying the Arkansas PSC the discretion to consider and act on all of the issues that could be presented in an interconnection agreement, as it is required to do under Section 252(b)(4)(A) of the Communications Act, the Arkansas Act has constructively abolished the Arkansas PSC for purposes of the 1996 Act. Thus, although the Arkansas legislature has the right to restrict the jurisdiction and authority of the Arkansas PSC, ACSI maintains that it does not have the authority to prevent these important functions from being performed in a manner consistent with federal policy.

Curiously, the Arkansas Attorney General also argues that the Arkansas PSC is capable of ordering unbundled network elements other than those identified by the FCC, citing the Arkansas PSC's direction to Southwestern Bell to provide AT&T with unused transmission

^{21/} ACSI Petition, pp. 9-10.

^{22/} See 47 U.S.C. §§ 252(c), 252(d).

media.^{23/} This action by the Arkansas PSC must be either: (1) a violation of the Arkansas Act, or (2) a statement that the minimum requirements of the 1996 Act which constrain the Arkansas PSC under the Arkansas Act are subject to interpretation by the Arkansas PSC. It is doubtful, however, that the Arkansas Act is correctly read to limit the Arkansas PSC to minimum standards of the Arkansas PSC's own choosing. Thus, when the FCC has ruled that the 1996 Act's minimum requirement demands that ILECs make seven specific unbundled network elements available, it seems highly unlikely that the Arkansas Act permits the Arkansas PSC to disagree and find that 11 elements must be provided under the 1996 Act. Certainly, the Arkansas PSC could not conclude that only five unbundled network elements must be made available. As a result, the Arkansas Attorney General's reference to the AT&T arbitration decision is simply irrelevant.

III. SECTION 253 OF THE 1996 ACT PROVIDES THE COMMISSION AN INDEPENDENT BASIS FOR GRANTING ACSI'S PETITION

As some commenters observe, preemption is also supported by Section 253(d) of the Communications Act, which permits Commission preemption of state laws and rules which have the effect of prohibiting the ability of any entity to provide any telecommunications service.^{24/} As ACSI stated in its Petition for Declaratory Ruling, "Subsection (d) of Section 253 empowers the FCC to preempt the enforcement of any law or regulation which contravenes Section 253(a). The Arkansas Act is such a law" ^{25/}

^{23/} Comments of the Arkansas Attorney General, p. 10.

^{24/} See Comments of AT&T, p. 2; Comments of the Telecommunications Resellers Association, pp. 7-8; Comments of MCI, p. 1.

^{25/} ACSI Petition, p. 15.

The Arkansas Act denies ACSI and other competitors the ability to obtain directives from the Arkansas PSC that mandate Southwestern Bell or other ILECs to fulfill bona fide requests for facilities needed to provide competitive services. Although, in a strict sense, the Arkansas Act does not set up a conventional "barrier to entry," it does set up barriers to developing viable competitive businesses by limiting access to the full range of network elements. Moreover, the Arkansas Act severely limits CLEC access to state and federal universal service funding, making it economically impossible for CLECs to compete in certain high cost areas of the state.

By limiting access to unbundled network elements and universal service funding, the Arkansas Act has the effect of thwarting the competitive provision of certain critical telecommunications services. This subverts the Commission's goal of removing regulatory, economic and operational impediments to competition and promoting viable competition nationwide.

IV. THE ARKANSAS ACT IS IN DIRECT CONFLICT WITH THE 1996 ACT AND THE COMMISSION'S LOCAL COMPETITION ORDER

As ACSI described in its Petition for Declaratory Ruling, the Arkansas PSC is prohibited by the Arkansas Act from requiring an ILEC to negotiate interconnection agreements or to resell local telecommunications services except as required by the 1996 Act.^{26/} Thus, as ACSI outlined in its Petition for Declaratory Ruling, the Arkansas Act:

- states that "in no event" shall the Arkansas PSC "impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act";^{27/}

^{26/} See Arkansas Act § 9.

^{27/} *Id.* at § 9(i).

- precludes the Arkansas PSC from requiring ILECs to permit resale of local services, to provide interconnection or to sell unbundled network elements "except to the extent required by the Federal Act";^{28/}
- directs that CLECs shall have the ability to obtain from ILECs operator services, directory listings and 911 services "only to the extent required in the Federal Act";^{29/}
- mandates that the Arkansas PSC "shall approve" ILEC statements of generally available terms and conditions unless shown by "clear and convincing evidence" that the statement fails to meet the minimum requirements of the 1996 Act;^{30/} and
- prevents participation by intervenors in arbitration proceedings, severely limiting the Arkansas PSC's ability to gauge the potential for discrimination against non-parties.^{31/}

Each of these provisions is in direct conflict with the 1996 Act and the *Local Competition Order*, and with the federal policy favoring local competition nationwide. Congress and the Commission intended for the federal requirements to function as a baseline -- a starting point for every state. The "partnership" created by Congress, and recognized by the Commission, requires the states to take the appropriate next steps to implement viable local competition. The Arkansas legislature has indicated its strong aversion to vibrant local competition. Therefore, it has stripped the Arkansas PSC of its ability to fulfill its obligations as a "partner" with the Commission.

Moreover, as the Staff of the Arkansas PSC noted in its analysis of the Arkansas Act, the requirement that the Arkansas PSC reject a negotiated agreement only if there is "clear and convincing evidence" that the agreement does not meet the minimum requirements of

^{28/} *Id.* at § 9(d).

^{29/} *Id.* at § 9(h).

^{30/} *Id.* at § 9(i).

^{31/} *Id.* at § 9(j).

Section 251 of the 1996 Act eliminates two of the grounds set forth in the 1996 Act for rejecting an agreement. The 1996 Act permits rejection of a negotiated agreement where: (1) the agreement discriminates against a telecommunications provider that is not a party to the agreement; or (2) the implementation of the agreement is not in the public interest, convenience and necessity.^{32/} This provision, along with each of the others, severely restricts the Arkansas PSC's ability to critically examine negotiated agreements in light of federal policy goals, and, therefore, is a basis for preemption.^{33/}

Contrary to what some commenters suggest, ACSI is not asking that it be given more than it is entitled to have.^{34/} ACSI wants to be able to compete effectively in the dynamic market for telecommunications services. The Arkansas legislature is trying to take that ability away by limiting ACSI's, and other CLECs', access to critical network elements, by making it more difficult for ACSI to negotiate with ILECs in Arkansas, and by limiting its ability to participate in proceedings that are directly relevant to its business in Arkansas.

ACSI asks that the Commission recognize and stop a situation that will erupt across the country if not checked. The 1996 Act and the Commission's *Local Competition Order* form a partnership with the states. It is becoming increasingly apparent, however, that SBC is adept at persuading state legislatures to pass laws that tie the hands of state commissions and prevent them from functioning as equal partners with the FCC. State commissions that are unable to fulfill their responsibilities under the 1996 Act, whether due to ILEC-sponsored legislation or otherwise, should be preempted.

^{32/} See 57 U.S.C. § 252(e)(2).

^{33/} See Arkansas PSC Staff Analysis, p. 11. See also Comments of Association for Local Telecommunications Services, pp. 3-6.

^{34/} See Comments of Northern Arkansas Telephone Company, p. 3.

V. THE UNIVERSAL SERVICE PROVISIONS OF THE ARKANSAS ACT SHOULD BE PREEMPTED

Section 5 of the Arkansas Act defines ILECs as eligible telecommunications carriers ("ETCs") for purposes of receiving Arkansas Universal Service Fund ("AUSF") and federal universal service funding. Pursuant to the Arkansas Act, in non-rural areas, the Arkansas PSC is authorized to designate another telecommunications carrier as an ETC only for the purpose of receiving high cost funding from the AUSF, and the CLEC must provide service to all customers in the ILEC's local exchange area and advertise the availability and charges of its services. The CLEC would be eligible to receive no more funding than the ILEC receives and could receive funding only for facilities it owns. A CLEC would be ineligible for high cost support until it had facilities in place and offered to serve all customers in the service area.

These requirements on ETC designation exceed the federal requirements and must be preempted. In order for a CLEC to be designated an ETC under Section 214(e) of the 1996 Act, it must: (1) offer the services that are supported by Federal universal service support mechanisms under section 254(c), *either using its own facilities or a combination of its own facilities and resale of another carrier's services* (including the services offered by another eligible telecommunications carrier); and (2) *advertise the availability of such services and the charges therefor using media of general distribution.*^{35/} The 1996 Act does not limit ETC status to carriers that provide service to all customers in an ILEC's service area. Nor does it limit ETC status to carriers using their own facilities exclusively.

^{35/} See 47 U.S.C. § 214(e)(1).

Despite claims by Southwestern Bell, the ATA, and the Arkansas Attorney General to the contrary,^{36/} these restrictions severely limit the ability of ACSI and other CLECs to participate in both the federal and state universal service funds because designation as an ETC by the state is a precondition to receiving funding from the federal universal service fund.^{37/} As a result, the Arkansas Act confers upon ILECs an insurmountable advantage over CLECS such as ACSI in affected areas, and violates Section 253 of the 1996 Act.

CONCLUSION

SBC apparently finds the policies of the United States Congress, the FCC and the Arkansas PSC (as well as those of the Texas Public Utility Commission and Oklahoma Corporation Commission) not to its liking. Therefore, it has turned to the fora of state legislatures and has sponsored legislation that minimizes the impact of the 1996 Act and the *Local Competition Order* as much as possible in the states where it operates. In Arkansas specifically, the resulting legislation attempts to evade attack by clothing clearly anti-competitive policies in language that gives the appearance of deference to federal law (*e.g.*, "except to the minimum extent required by the Federal Act"). The flaw in this plan, however, is that the 1996 Act is a living document whose evolution is far from complete. By preventing the Arkansas PSC from doing more than is required under the 1996 Act and the *Local Competition Order*, the Arkansas Act renders the Arkansas PSC irrelevant to the process established by the 1996 Act and the *Local Competition Order*. Input from the

^{36/} Comments of Southwestern Bell, p. 17; Comments of the Arkansas Telephone Association, p. 16; Comments of the Arkansas Attorney General, p. 17.

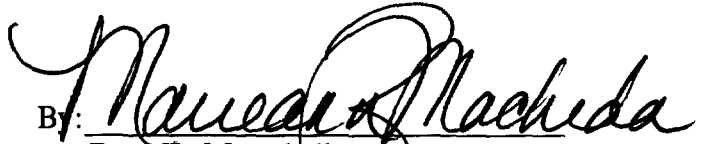
^{37/} See Comments of ALTS, p. 6.

Arkansas PSC is irrelevant because it is not authorized to add anything to what Congress and the FCC have already done.

Under these circumstances, ACSI respectfully requests that the Commission preempt the authority of the Arkansas PSC to arbitrate and approve interconnection agreements pursuant to Section 252(e)(5) of the Communications Act, or to certify CLECs as ETCs pursuant to Section 5 of the Arkansas Act and Section 214(e) of the Communications Act, and declare that such approvals, arbitrations and certifications pertaining to Arkansas will instead be carried out by the FCC.

Respectfully submitted,

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Certificate of Service

I, Marieann Machida, hereby certify that, on this 20th day of May 1997, I caused a copy of the *Reply Comments of ACSI* to be sent by U.S. mail, first class, postage prepaid, to the individuals listed on the attached pages.


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